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**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

INTEGRA TELECOM OF WASHINGTON,
INC.,
a Washington corporation,

Complainant,

v.

VERIZON NORTHWEST, INC.,

Respondent

DOCKET NO. 053038

RESPONSE TO VERIZON'S MOTION TO
DISMISS

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

In its Motion to Dismiss ("Motion"), Respondent Verizon asserts that Integra's state law claims are preempted by the Telecommunications Act of 1996 (the "Telecommunications Act" or "Act") and that Integra has failed to state a claim on which the Commission may grant relief because the interconnection agreement between the parties (the "Agreement") controls this dispute. The mere fact that the parties to this case also are parties to an interconnection agreement, however, does not mean that Integra is unable to hold Verizon accountable for its violations of state law. Neither the Telecommunications Act nor any other authority prohibits the Commission from exercising its responsibility to regulate in the public interest pursuant to the state statutes at issue in this case. Accordingly, the Commission should deny Verizon's Motion.

II. ARGUMENT

A. The Standard of Review

In deciding Verizon's Motion to Dismiss pursuant to WAC 480-07-380, the Commission applies the standards applicable to a motion to dismiss for failure to state a claim for relief

1 RESPONSE TO MOTION TO DISMISS

Integra Telecom of Washington, Inc.
1201 NE Lloyd Blvd., Ste. 500
Portland, OR 97232
Phone: (503) 453-8000
Fax: (503) 453-8221

1 pursuant to CR 12(b)(6). Under CR 12(b)(6), “dismissal is appropriate only if the complaint
2 alleges no facts that would justify the relief requested. The complaint's allegations and any
3 reasonable inferences must be accepted as true.” *In the Matter of the Joint Application of*
4 *PacifiCorp and PacifiCorp Washington, Inc.*, 2002 Wash. UTC LEXIS 5, 5-6 (2002) (citations
5 omitted). “Courts should dismiss under [CR 12(b)(6)] only when it appears beyond a reasonable
6 doubt that no facts exist that would justify recovery.” *Modern Sewer Corp. v. Nelson Distrib.*,
7 125 Wn. App. 564, 568 (2005). Under CR 12(b)(6), “a plaintiff's allegations are presumed to be
8 true,’ and ‘a court may consider hypothetical facts not part of the formal record.’ CR 12(b)(6)
9 motions should be granted ‘sparingly and with care’ and ‘only in the unusual case in which
10 plaintiff includes allegations that show on the face of the complaint that there is some
11 insuperable bar to relief.’” *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755 (1994)
12 (citations omitted).

13 **B. Integra’s State Law Claims Are Not Preempted**

14 Verizon claims that Integra cannot bring claims for violation of Washington law because
15 Integra is a party to an interconnection agreement with Verizon. Verizon states that Integra’s
16 state law claims would “circumvent” the “interconnection agreement process” outlined in federal
17 law. Yet Verizon does not explain *how* the Commission’s consideration of the state statutes at
18 issue would circumvent the interconnection agreement process or what specific aspects of state
19 law actually “conflict with” the “federal statutory scheme.” Essentially, Verizon argues that
20 merely by virtue of the presence of an interconnection agreement, Integra’s state law claims are
21 automatically preempted and the sole remedy for Verizon’s anticompetitive conduct is provided
22 by federal law.

1 The Act, however, does not completely preempt state law claims just because the parties
2 to the case also are parties to an interconnection agreement.¹ In fact, Verizon's argument ignores
3 Commission precedent in which the Commission has adjudicated state law claims that are
4 brought in dockets that also involve a carrier's obligation under an interconnection agreement.
5 For example, in *WorldCom v. GTE Northwest Inc.*, 1999 Wash. UTC LEXIS 295 (1999), the
6 Commission found that GTE violated *both* its interconnection agreement with WorldCom *and*
7 RCW 80.36.170 when it refused to pay reciprocal compensation to WorldCom for ISP calls.
8 Additionally, in *AT&T Comm. of the Pacific Northwest, Inc. v. Qwest Corp.*, 2001 Wash. UTC
9 LEXIS 218 (2001), the Commission denied Qwest's motion for summary determination that
10 AT&T was prohibited from bringing state law claims because the Telecommunications Act
11 required AT&T to arbitrate its dispute. Therefore, contrary to Verizon's contention, the
12 Commission has the authority to hear Integra's state law claims in this docket even though
13 Verizon and Integra also are parties to an interconnection agreement.

14 Notably, Verizon does not cite any applicable authority to the contrary. The primary case
15 on which Verizon relies is inapposite. In *Verizon North v. Strand*, 309 F.3d 935 (6th Cir. 2002),
16 the Michigan Public Service Commission required incumbent local exchange carriers to offer
17 network elements and services to competitors through published tariffs. The federal court found
18 that the "alternative route to interconnection" provided by the tariffs was inconsistent with, and
19 therefore preempted by, federal law because it completely "bypass[ed] the negotiation/arbitration
20 of an interconnection agreement" procedure set forth in federal law, which was "central to the
21 FTA" in a way that other federal requirements are not. *Strand*, 309 F.3d at 940 n.3, 941.

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25 ¹ See *North Cty Comm. Corp. v. Verizon New York, Inc.*, 233 F.Supp.2d 381 (N.D.N.Y. 2002).

1 Here, there is no circumvention of the process for obtaining or reviewing an
2 interconnection agreement. This case involves the question of whether the Commission can
3 apply state statutes when addressing the anticompetitive conduct of a party who also happens to
4 be a party to an interconnection agreement. The Commission has, and can, consider state law
5 claims in those circumstances, and neither the holding nor the logic of *Strand* dictates a different
6 result.

7 The Commission's authority to hear state law claims in this case is supported, not
8 defeated, by the Telecommunications Act. The Act "permits a great deal of state commission
9 involvement in the new regime it sets up for the operation of local telecommunications markets
10 in America." *Strand*, 309 F.3d at 944. The Act allows state commissions to enforce preexisting
11 and new regulations and statutes as long as they are not inconsistent with federal law. 47 U.S.C.
12 § 261(b) ("Nothing in this part shall be construed to prohibit any State commission from
13 enforcing regulations . . . if such regulations are not inconsistent with the provisions of this
14 part."); 47 U.S.C. § 261(c) ("Nothing in this part precludes a State from imposing additional
15 requirements on a telecommunications carrier for intrastate services that are necessary to further
16 competition in the provision of telephone exchange service or exchange access, as long as the
17 State's requirements are not inconsistent with this part or the Commission's regulations to
18 implement this part."). Therefore, a state statute that addresses competition and access to
19 telecommunications services and elements is not automatically preempted simply because the
20 parties also are parties to an interconnection agreement. Because Verizon has failed to point to
21 any *actual* conflict between state law and the terms of the Agreement,² it has failed to carry its

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23 ² Notably, in the Agreement, Verizon agrees to meet any applicable "service standard imposed
24 by the FCC or any state regulatory authority." Agreement, § III-11 (emphasis added).

25 Therefore, Verizon is contractually obligated to adhere to conditions imposed by state law.

1 burden to prove that there is an “insuperable bar to relief,” and the Commission should deny its
2 Motion.³

3 Verizon made the same argument that there is “no room” for independent state law claims
4 to the United States District Court for the Northern District of New York, which rejected it. In
5 *North County Communications Corporation v. Verizon New York, Inc.*, 233 F.Supp.2d 381
6 (N.D.N.Y. 2002), the District Court rejected Verizon’s attempt to remove a complaint alleging
7 violation of state law to federal court on the ground that the state law claims were completely
8 preempted by the Telecommunications Act. The District Court noted that “neither law nor logic
9 would support” a claim that state law is completely preempted by the Telecommunications Act.
10 The court also stated: “Yet, Verizon's argument, that simply by virtue of the interconnection
11 agreement between the parties the claim must be adjudged under the legislation giving rise to
12 such relationship, necessarily implies complete preemption.” The court continued:

13 Second, if Verizon's argument were to be taken as true, then every dispute arising
14 between companies that are parties to an interconnection agreement would
15 necessarily have to be resolved under the Telecommunications Act for the sole
16 reason that such legislation created their relationship. North County could thus not
17 bring allegations of monopolistic practices against Verizon, but another party
18 could so long as the other party was not subject to an interconnection agreement.
19 Presumably, all smaller companies are parties to interconnection agreements.
20 Thus, under Verizon's theory, no smaller companies could bring a state law claim
21 against it. Insofar as it pertains to disputes between companies that are parties to
22 interconnection agreements, [state law] would be completely preempted, even
23 though the interconnection agreement itself, like the one here, can be read to
24 allow state law claims. This was clearly not the intention of Congress.

20 *Id.* at 388.

21 Although *North County* involves some facts that are different from the ones in this case,⁴
22 the lesson of that decision applies here. Like the plaintiff in *North County*, Integra has qualms

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24 ³ If Verizon raises any additional issues or cites additional authorities in any reply brief, Integra
25 respectfully requests permission to address those issues or authorities.

1 with Verizon's anticompetitive conduct outside of the scope of the Agreement. The state statutes
2 invoked by Integra, like the state statutes in *North County*, are intended to remedy such
3 anticompetitive conduct. For the same reason that the court rejected Verizon's argument that
4 there was "no room" for independent state law claims in *North County*, the Commission should
5 reject Verizon's argument that the Commission is powerless to enforce the state statutes in this
6 case.⁵

7 To hold otherwise would eliminate the ability of the Commission, and the State of
8 Washington, to enforce state statutes that address competition in Washington simply because the
9 parties are also parties to an interconnection agreement. As a practical matter, a carrier cannot
10 effectively compete without an interconnection agreement. By accepting Verizon's argument,
11 the Commission would be putting competitors in the untenable position of choosing between
12 executing an interconnection agreement, thereby gaining the ability to meaningfully compete but
13 foregoing their rights under state law, or forsaking the ability to compete through an
14 interconnection agreement and pursuing state law remedies exclusively. That result was not
15 intended under the Telecommunications Act and is not justified in this case. The state statutes at
16 issue here are part of the Commission's broader responsibility to regulate in the public interest,
17 and they are not preempted by the Telecommunications Act.

18 In this case, Integra's Complaint primarily seeks to remedy Verizon's anticompetitive
19 conduct of providing facilities that are insufficient to provide the most basic of telephone
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21 ⁴ In *North County*, the plaintiff did not allege that Verizon's conduct violated the terms of any
22 interconnection agreement, only that it violated state law governing competition.

23 ⁵ In fact, if the Commission determines that Integra may assert only state law claims or a claim
24 for violation of the Agreement, but not both, Integra would request leave to replead to eliminate
25 the claim for violation of the Agreement.

1 functions – the ability to hang up. That is precisely the kind of conduct that is addressed by the
2 applicable state statutes. While Integra certainly believes that Verizon’s conduct violates the
3 Agreement as well as state law, *see infra*, the crux of Integra’s Complaint is Verizon’s violation
4 of state law. Given that Verizon has failed to cite any controlling authority that would preclude
5 Integra from seeking relief on its state law claims, and that the Telecommunications Act does not
6 require such preclusion, the Commission should deny Verizon’s Motion in its entirety.⁶

7 **C. Integra’s Complaint Alleges Facts Upon Which the Commission May Grant Relief**

8 As an additional argument, Verizon asserts that Integra fails to state a claim for violation
9 of state law because the terms of the Agreement govern the parties’ dispute. In support, Verizon
10 misstates the parties’ obligations under the terms of the Agreement. Verizon also relies on
11 arguments that go the merits of the dispute and that are inappropriate to consider on a motion to
12 dismiss, which is limited to whether, on the face of the Complaint, it is “beyond reasonable
13 doubt” that Integra cannot make a claim. In this case, there is no doubt that Integra has stated a
14 claim for violation of state law.

15 **1. The Dispute Resolution Clause Does Not Prohibit Integra’s Claim**

16 Verizon claims that Integra was “required” to use the alternative dispute resolution
17 procedure in the Agreement to resolve its dispute with Verizon, and Integra’s purported failure to
18 do so means Integra cannot state a claim. In reality, the alternative dispute resolution provision
19 in the Agreement is permissive and does not require Integra to pursue negotiation (although
20 Integra did attempt to negotiate with Verizon for some time and without any satisfactory
21 resolution) or arbitration. The Agreement expressly states that the parties agree to the dispute

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23 ⁶ Even assuming that the state law claims are preempted – which they are not – Verizon’s
24 Motion is overly broad because it asks the Commission to dismiss Integra’s contract claim as
25 well as its statutory claims.

1 resolution provision “without waiving the right to seek relief from the Commission”
2 Moreover, the arbitration provision states that the parties “*may* submit the dispute to binding
3 arbitration.” (Emphasis added.) Therefore, negotiation and arbitration are not conditions
4 precedent to filing a complaint with the Commission. Verizon’s argument simply misstates the
5 plain language of the dispute resolution provision.

6 Interestingly, the negotiation section provides that, “[a]t the written request of a Party,”
7 the parties will appoint representatives to negotiate. That provision permits either party –
8 including Verizon, if it so chose – to request negotiation. Verizon did not do so. The facts will
9 show that Integra, however, *did* negotiate with Verizon. Integra will produce evidence that its
10 negotiations with Verizon on the issue described in the Complaint date back to at least 2001 and
11 consist of numerous communications. Integra consistently tried to get Verizon to fix the
12 problem through negotiations, but to no effect. For Verizon now to claim that Integra did not
13 negotiate with Verizon on this issue is simply incredible and is not a basis for dismissing
14 Integra’s Complaint.

15 **2. Integra’s Complaint Does Not Involve a Billing Dispute**

16 Additionally, Verizon claims that the “billing disputes” in the Complaint are “stale and
17 barred by the terms of the ICA.” Integra, though, does not claim that Verizon misbilled Integra,
18 or that the billing statements contained erroneous information. Instead, Integra complains that it
19 was required to order resale services instead of lower-priced UNEs to provide adequate service
20 to the customers listed in the Complaint, while Verizon is able to provide service to those
21 customers using its network without any of the problems experienced by Integra. The content of
22 the bills is not at issue; the discriminatory way that Verizon has treated Integra is at issue. This
23 case, therefore, does not involve any billing disputes and is not barred by any term of the
24 Agreement.

1 **3. Integra Does Not Ask the Commission to Award Damages**

2 Verizon also takes issue with Integra’s request that the Commission make a finding that
3 Integra would use to support a claim for damages in court and claims that the request (a)
4 circumvents the Commission’s lack of authority to award damages, and (b) violates the
5 limitation of liability provision of the Agreement. However, and without conceding that the
6 Commission lacks authority to award damages, Integra does not ask the Commission to award
7 damages in this case. The Complaint merely asks for a finding that Verizon violated state law,
8 which the Commission clearly has authority to do, which Integra would then use to obtain
9 damages from Verizon in court. There is no circumvention of Washington law.

10 Additionally, the request does not violate the limitation of liability provision. The
11 provision, to the extent it applies, limits liability to direct damages, “[e]xcept when damages are
12 caused directly by a Party’s willful misconduct.” Verizon does not explain how Integra’s
13 Complaint allegedly violates that provision. Certainly the mere fact that Integra requests
14 declaratory and injunctive-type relief in the Complaint does not violate the provision. Even
15 assuming, *arguendo*, that the provision applies in this case, the Complaint does not request any
16 specific damages, let alone damages that are not “direct damages.” Even if it did, there is an
17 exception for willful misconduct that may apply. Given the various permutations that could
18 permit Integra to recover if the limitation of liability provision applied, the limitation of liability
19 provision is hardly the “insuperable bar to relief” that would justify granting Verizon’s Motion.

20 **4. The Substance of the Agreement Does Not Justify Dismissal**

21 Verizon contends that Integra’s alleged failure to specify how Verizon violated the
22 Agreement’s performance standards means that Integra’s Complaint should be dismissed in its
23 entirety. However, Verizon’s argument goes to the merits of the case – whether Verizon actually
24 violated the Agreement – not to the sufficiency of the pleading. The Commission must assume
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1 all facts asserted by Integra are true and must give all reasonable inferences to Integra. Integra
2 has alleged facts sufficient to state a cause of action for violation of the Agreement by
3 describing, in great detail, the problems it experienced with providing service using Verizon's
4 elements, as well as Integra's efforts to remedy the problems. It can hardly be said that it is
5 "beyond a reasonable doubt that no facts exist that would justify recovery." Instead, Verizon's
6 argument raises substantive issues that should be resolved at hearing, not on a motion to dismiss.
7 *See In the Matter of the Joint Application of PacifiCorp and PacifiCorp Washington, Inc.*, 2002
8 Wash. UTC LEXIS 5 (2002) (refusing to grant motion to dismiss where factual question should
9 be resolved at hearing); *In the Matter of the Petition of Mount St. Helens Tours, Inc.*, 2000 Wash.
10 UTC LEXIS 216 (2000) (same).

11 This aspect of Verizon's Motion is more appropriately considered a motion to make more
12 definite and certain. Integra believes it has alleged sufficient facts to demonstrate violation of
13 the Agreement. After all, Verizon filed an Answer concurrently with the Motion and denied that
14 it violated the Agreement, so it cannot contend that it is unable to adequately respond to the
15 allegations. However, if the Commission believes Integra has inadequately described the
16 provisions of the Agreement at issue, Integra requests that the Commission permit Integra to
17 amend its Complaint to include more specific allegations.

18 **5. WAC 480-07-650 Does Not Apply**

19 Finally, Verizon complains that Integra's entire complaint must be dismissed because
20 Integra did not follow the procedures in WAC 480-07-650. Integra, however, has not invoked
21 that rule and is not bound by its procedures.

22 WAC 480-07-650(1) provides: "A telecommunications company that is a party to an
23 interconnection agreement with another telecommunications company *may* petition under this
24 rule for enforcement of the agreement." (Emphasis added.) Under the rule's plain language, *if*
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1 the party elects to file under that rule, it must include certain things in its petition and effect
2 service of the petition in a certain way. Notably, the procedures also include an expedited
3 timeframe for answering the petition (five business days) and for the Commission's final
4 decision (90 days). A party to an interconnection agreement, however, is not required to file a
5 petition under that rule. A party clearly may elect to forego the expedited procedures in WAC
6 480-07-650 in favor of filing a complaint and following the Commission's regular procedures for
7 resolving complaints. That is especially true where, as here, the respondent has violated state
8 law as well as the terms of an interconnection agreement, and the complaint involves both state
9 law claims and claims for violation of the interconnection agreement.

10 Even if the regulation applies – which it does not – Integra's failure to follow it does not
11 justify dismissal of Integra's statutory claims, which are independent of its claim for violation of
12 the Agreement. Moreover, if the Commission does determine that the regulation applies and
13 Integra did not follow it, Integra asks the Commission to allow Integra to amend its Complaint to
14 remedy any technical deficiency.

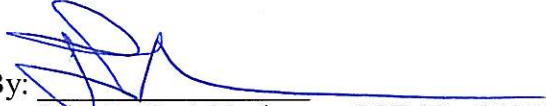
15 III. CONCLUSION

16 Verizon has failed to satisfy the high burden that applies to a motion to dismiss for failure
17 to state a claim. Integra's state law claims are not preempted by federal law, and Integra has
18 alleged facts sufficient to state claims both for violation of state law and for breach of the
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1 interconnection agreement. Accordingly, the Commission should dismiss Verizon's Motion in
2 its entirety. Alternatively, the Commission should allow Integra to amend its Complaint as
3 necessary.

4 Dated this 18th day of July, 2005.

5 INTEGRA TELECOM

6 
7 By: _____
8 John P. (Jay) Nusbaum, OSB No. 96378